

Rulemaking under IC 13-14-9, IC 13-14-9.5, and IC 4-22-2

The following document contains the statutes that constitute IDEM's rulemaking process under Indiana Code 13-14-9 and certain other "special" rulemaking actions that will come before the Environmental Rules Board (ERB). Included with the statutory language is a brief explanation of each statute, how it applies to duties of the ERB and the interrelationship of the ERB with the agency.

Note that when referring to statutes, there are references to chapters, articles, sections and subsections. For statutes, the nomenclature is as follows: when referencing IC 13-14-9-1(a), for example, 13 is the title; 14 is the article; 9 is the chapter; 1 is the section; and (a) is the subsection. A similar nomenclature applies to rules. For example when referencing 327 IAC 5-4-3(a), 327 is the title; 5 is the article; 4 is the rule; 3 is the section; and (a) is the subsection.

IC 13-14-9-1

Applicability of chapter

Sec. 1. (a) Except as provided in sections 8 and 14 of this chapter, this chapter applies to the following:

(1) The board.

(2) The underground storage tank financial assurance board established by IC 13-23-11-1.

(b) In addition to the requirements of IC 4-22-2 and IC 13-14-8, a board may not adopt a rule except in accordance with this chapter.

The ERB has jurisdiction over the rules that govern the air, water and solid waste programs, whereas the Underground Storage Tank Financial Assurance Board (FAB) retains authority over rules to operate an underground storage tank, including release detection, prevention and correction. The FAB also adopts rules related to financial responsibility requirements for owners and operators of underground storage tanks and uses of the underground storage tank excess liability trust fund.

IC 4-22-2 is the chapter that governs the adoption of rules by other state agencies. Title 4 also applies to IDEM rulemaking actions, except as specifically outlined in IC 4-22-2-13.

IC 13-14-9-2

Public comment periods

Sec. 2. Except as provided in sections 4.5, 7, 8, and 14 of this chapter, a board may not adopt a rule under this chapter until the board has conducted at least two (2) public comment periods, each of which must be at least thirty (30) days in length.

Except in very limited circumstances which are spelled out in the above-referenced sections of chapter 9, two written public comment periods are required as part of the rulemaking process. The comments received and the agency's responses thereto are provided to the ERB to aid the board in understanding the issues raised by interested parties. This is in addition to the public hearings held before the board prior to rule adoption.

IC 13-14-9-3

First public comment period; notice

Sec. 3. (a) Except as provided in subsection (b), the department shall provide notice in the Indiana Register of the first public comment period required by section 2 of this

chapter. A notice provided under this section must do the following:

- (1) Identify the authority under which the proposed rule is to be adopted.*
- (2) Describe the subject matter and the basic purpose of the proposed rule. The description required by this subdivision must:*
 - (A) list all alternatives being considered by the department at the time of the notice;*
 - (B) state whether each alternative listed under clause (A) creates:*
 - (i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or*
 - (ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;*
 - (C) state the extent to which each alternative listed under clause (A) differs from federal law;*
 - (D) include any information known to the department about the potential fiscal impact of each alternative under clause (A) that creates:*
 - (i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or*
 - (ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements; and*
 - (E) set forth the basis for each alternative listed under clause (A).*
- (3) Describe the relevant statutory or regulatory requirements or restrictions relating to the subject matter of the proposed rule that exist before the adoption of the proposed rule.*
- (4) Request the submission of alternative ways to achieve the purpose of the proposed rule.*
- (5) Request the submission of comments, including suggestions of specific language for the proposed rule.*
- (6) Include a detailed statement of the issue to be addressed by adoption of the proposed rule.*
 - (b) This section does not apply to rules adopted under IC 13-18-22-2, IC 13-18-22-3, or IC 13-18-22-4.*
 - (c) The notice required under subsection (a) shall be published electronically in the Indiana Register under procedures established by the publisher.*

This section provides the requirements for the first notice of rulemaking that must be published in the Indiana Register. This is the first of the required public comment periods referenced in section 2 of the chapter. Under this notice, no actual rule language is published. This notice lets people know that a rulemaking is being started and provides a statement of what the rulemaking proposes to address, including options being considered at the outset of the rulemaking. Often, public participation may alter the direction a rulemaking takes but it is important that the public be aware of why the agency believes a rulemaking is necessary on a particular subject. The exception referenced in subsection (b) of the section is related to the adoption of rules for state regulated wetlands.

IC 13-14-9-4

Second public comment period; notice

Sec. 4. (a) The department shall provide notice in the Indiana Register of the second public comment period required by section 2 of this chapter. A notice provided under this section must do the following:

- (1) Contain the full text of the proposed rule, to the extent required under IC 4-22-2-*

24(c).

(2) Contain a summary of the response of the department to written comments submitted under section 3 of this chapter during the first public comment period.

(3) Request the submission of comments, including suggestions of specific amendments to the language contained in the proposed rule.

(4) Contain the full text of the commissioner's written findings under section 7 of this chapter, if applicable.

(5) Identify each element of the proposed rule that imposes a restriction or requirement on persons to whom the proposed rule applies that:

(A) is more stringent than a restriction or requirement imposed under federal law; or

(B) applies in a subject area in which federal law does not impose a restriction or requirement.

(6) With respect to each element identified under subdivision (5), identify:

(A) the environmental circumstance or hazard that dictates the imposition of the proposed restriction or requirement to protect human health and the environment;

(B) examples in which federal law is inadequate to provide the protection referred to in clause (A); and

(C) the:

(i) estimated fiscal impact; and

(ii) expected benefits;

based on the extent to which the proposed rule is more stringent than the restrictions or requirements of federal law, or on the creation of restrictions or requirements in a subject area in which federal law does not impose restrictions or requirements.

(7) For any element of the proposed rule that imposes a restriction or requirement that is more stringent than a restriction or requirement imposed under federal law or that applies in a subject area in which federal law does not impose restrictions or requirements, describe the availability for public inspection of all materials relied upon by the department in the development of the proposed rule, including, if applicable:

(A) health criteria;

(B) analytical methods;

(C) treatment technology;

(D) economic impact data;

(E) environmental assessment data;

(F) analyses of methods to effectively implement the proposed rule; and

(G) other background data.

(b) The notice required under subsection (a) shall be published electronically in the Indiana Register under procedures established by the publisher.

Second notice is the point at which actual draft rule language is published. It is the second opportunity for written comment by the general public. The notice must also contain a summary of all comments received during the first public comment period and IDEM's responses thereto.

There is a reference to the commissioner's findings under (a)(4) of this section. This refers to a rulemaking begun under IC 13-14-9-7, which as you will see, allows the agency to eliminate the first public comment period in an effort to streamline the rulemaking process. The specific reasons the agency may do that are spelled out under section 7.

IC 13-14-9-4.2

Department required to provide the office of management and budget fiscal impact statement to board

Sec. 4.2. Not less than fourteen (14) days before the date of preliminary adoption of a proposed rule by a board, the department shall make available to the board the fiscal impact statement prepared by the office of management and budget with respect to the proposed rule under IC 4-22-2-28(e).

This section refers to a fiscal impact analysis for a rule that the agency determines will have at least a \$500,000 impact on all entities to whom it applies. The agency is required to submit the fiscal impact statement to the Office of Management and Budget (OMB) at least 66 days prior to the date proposed for preliminary adoption. OMB has 45 days to approve the fiscal impact statement and return it to the agency so that it can be made part of the board packet that is sent to the ERB for the preliminary adoption hearing. The board members must have the fiscal impact analysis at least 14 days prior to the preliminary adoption hearing. The same requirements do not apply to a fiscal impact analysis on a rule with an estimated impact less than \$500,000. The agency is still required to submit the analysis to OMB and OMB is still required to approve the analysis but the analysis is not required to be provided to the board prior to adoption of the rule.

IC 13-14-9-4.5

Third public comment period; notice

Sec. 4.5. (a) Except for a rule:

(1) that has been preliminarily adopted by a board in a form that is:

(A) identical to; or

(B) not substantively different from;

the proposed rule published in a second notice under section 4 of this chapter; or

(2) for which the commissioner has made a determination and prepared written

findings under section 7 or 8 of this chapter;

a board may not adopt a rule under this chapter until the board has conducted a third public comment period that is at least twenty-one (21) days in length.

(b) The department shall publish notice of a third public comment period with the:

(1) text;

(2) summary; and

(3) fiscal analysis;

that are required to be published in the Indiana Register under section 5(a)(2) of this chapter.

(c) The notice of a third public comment period that must be published in the Indiana Register under subsection (b) must request the submission of comments, including suggestions of specific amendments, that concern only the portion of the preliminarily adopted rule that is substantively different from the language contained in the proposed rule published in a second notice under section 4 of this chapter.

The third written comment period attaches to a rule that has been preliminarily adopted by the board and is being published as a preliminarily adopted rule in the Indiana Register. If a rule has not changed substantively from what was published at second notice, no third written comment period is required. A third written comment period is also not required for a rulemaking started under sections 7 or 8 of chapter 9. The circumstances under which a rule may be initiated under those sections are limited and specifically spelled out in those sections.

Regardless of whether there is a notice of a third written comment period attached to a rule published as a preliminarily adopted rule, the requirements for publication of the rule include providing a summary of comments made at the public hearing, the agency's response to those comments and a copy of the fiscal impact analysis for any rule that has an estimated economic impact of \$500,000 or more.

IC 13-14-9-5

Adoption; prerequisites

Sec. 5. (a) A board may not adopt a rule until all of the following occur:

- (1) The board holds a board meeting on the proposed rule.*
- (2) The department, after approval of the proposed rule by the board under subsection (c), publishes the following in the Indiana Register as provided in IC 4-22-2-24(c):*
 - (A) The full text of the proposed rule, including any amendments arising from the comments received before or during the meeting held under subdivision (1).*
 - (B) A summary of the response of the department to all comments received at the meeting held under subdivision (1).*
 - (C) For a proposed rule with an estimated economic impact on regulated entities that is greater than five hundred thousand dollars (\$500,000), a copy of the office of management and budget fiscal analysis required under IC 4-22-2-28.*
- (3) The board, after publication of the notice under subdivision (2), holds another board meeting on the proposed rule.*
- (4) If a third public comment period is required under section 4.5 of this chapter, the department publishes notice of the third public comment period in the Indiana Register.*
- (b) Board meetings held under subsection (a)(1) and (a)(3) shall be conducted in accordance with IC 4-22-2-26(b) through IC 4-22-2-26(d).*
- (c) At a board meeting held under subsection (a)(1), the board shall determine whether the proposed rule will:*
 - (1) proceed to publication under subsection (a)(2);*
 - (2) be subject to additional comments under section 3 or 4 of this chapter, considering any written finding made by the commissioner under section 7 or 8 of this chapter; or*
 - (3) be reconsidered at a subsequent board meeting in accordance with IC 4-22-2-26(d).*

This section provides all the steps that must be followed for a rule to be properly adopted. It includes the requirements for the board to hold open public meetings on a rule as well as for the agency to publish a rule after the board has preliminarily adopted it. The agency must include a summary of comments received during the initial public hearing and its responses thereto. If a rule has an estimated fiscal impact of \$500,000 or more, the OMB-approved fiscal impact that was provided to the board at the preliminary adoption hearing must also be published. If required, the agency must also publish a notice of third public comment period with the preliminarily adopted rule. Subsection (c) refers to those rulemakings begun under IC 13-14-9-7 or IC 13-14-9-8. The board may, if it determines that additional public comment is necessary, direct the agency to republish the rule as either a first or second notice with the requisite 30-day written comment periods attached. The board may also postpone board action on a rule to a subsequent meeting under subsection (c)(3).

IC 13-14-9-6

Board meetings; written materials

Sec. 6. In addition to the requirements of section 8 of this chapter, the department shall include the following in the written materials to be considered at the board meetings held under section 5(a)(1) and 5(a)(3) of this chapter:

- (1) The full text of the proposed rule, as most recently prepared by the department.*
- (2) The written responses of the department to all comments received:*
 - (A) during the immediately preceding comment period for a board meeting held under section 5(a)(1) of this chapter;*
 - (B) during the immediately preceding board meeting under section 5(a)(1) of this chapter for a board meeting held under section 5(a)(3) of this chapter if a third public comment period is not required under section 4.5 of this chapter; or*
 - (C) during:*
 - (i) a third public comment period that address the portion of the preliminarily adopted rule that is substantively different from the language contained in the proposed rule published in a second notice under section 4 of this chapter; and*
 - (ii) the immediately preceding board meeting held under section 5(a)(1) of this chapter;*
- for a board meeting held under section 5(a)(3) of this chapter if a third public comment period is required under section 4.5 of this chapter.*
- (3) The full text of the office of management and budget fiscal analysis if a fiscal analysis is required under IC 4-22-2-28.*

Section 6 outlines the materials that must be included in a board packet sent to the board. Packets are also made available on IDEM's website and are sent electronically to anyone who signs up to receive them. The agency is required to include the rule as most recently prepared by the agency. This means that a rule may change based on comments received during the second notice, which is the first time the public has the opportunity to see the draft language and comment on specific language. Thus, the rule may look different when it is sent out as part of a board packet than how it looked when published as a draft at second notice. When this occurs, a third written comment period on those sections of the rule that differ may be required under section 4.5, if the differences are substantive. The board packet for final adoption must include all comments received at the preliminary adoption hearing and, if applicable, all comments received during the third written comment period. IDEM responses to all comments must also be included in the packet. If a rule has an estimated \$500,000 fiscal impact, the OMB-approved fiscal impact analysis must again be included in the final adoption board packet.

IC 13-14-9-7

Waiver of first public comment period

Sec. 7. (a) Unless a board determines under section 5(c)(2) of this chapter that a proposed rule should be subject to additional comments, section 3 of this chapter does not apply to a rulemaking action if the commissioner determines that the rulemaking policy alternatives available to the department are so limited that the public notice and comment period under section 3 of this chapter would provide no substantial benefit to:

- (1) the environment; or*
- (2) persons to be regulated or otherwise affected by the proposed rule.*
- (b) If the commissioner makes a determination under subsection (a), the commissioner shall prepare written findings under this section. The full text of the commissioner's*

written findings shall be included in the public notice provided under section 4 of this chapter.

This is commonly referred to as a “Section 7” rulemaking. This is the first of the types of rulemakings that allow for a slightly expedited process by skipping the first notice of comment period and moving straight to a second notice, which includes actual draft rule language. The notice must also contain the commissioner’s written findings that the policy alternatives, or more basically, how the rule can be written, is so limited that the first notice and the subsequent written comment period would not benefit the environment or parties affected by the rulemaking. The board may disagree that a rule meets the requirements for a section 7 rulemaking, at which point it can direct the agency to renote the rule as either a first or second notice and allow the rule to proceed through the regular rulemaking process under IC 13-14-9.

Typical examples of section 7 rulemakings include: changing a rule to reflect a change to a statute that applies or is referenced in a rule; and incorporation by reference of technical standards such as ASTM standards for piping diameters in drinking water rules. These are often updates to standards which change over time.

IC 13-14-9-8

Special rulemaking process for certain rules; findings; notice; hearing; rule based on nullified federal law or regulation

Sec. 8. (a) Except as provided in subsection (g), unless a board determines that a proposed rule should be subject to additional comments or makes a determination described in subsection (f), sections 2 through 7 and sections 9 through 14 of this chapter do not apply to a rulemaking action if the commissioner determines that:

(1) the proposed rule constitutes:

(A) an adoption or incorporation by reference of a federal law, regulation, or rule that:

(i) is or will be applicable to Indiana; and

(ii) contains no amendments that have a substantive effect on the scope or intended application of the federal law or rule;

(B) a technical amendment with no substantive effect on an existing Indiana rule;

or

(C) an amendment to an existing Indiana rule, the primary and intended purpose of which is to clarify the existing rule; and

(2) the proposed rule is of such nature and scope that there is no reasonably anticipated benefit to the environment or the persons referred to in section 7(a)(2) of this chapter from the following:

(A) Exposing the proposed rule to diverse public comment under section 3 or 4 of this chapter.

(B) Affording interested or affected parties the opportunity to be heard under section 3 or 4 of this chapter.

(C) Affording interested or affected parties the opportunity to develop evidence in the record collected under sections 3 and 4 of this chapter.

(b) If the commissioner makes a determination under subsection (a), the commissioner shall prepare written findings under this section. The full text of the commissioner's written findings shall be included in:

(1) the notice of adoption of the proposed rule; and

(2) the written materials to be considered by the board at the public hearing held under this section.

(c) The notice of adoption of a proposed rule under this section must:

- (1) be published in the Indiana Register; and*
- (2) include the following:*
 - (A) Draft rule language that includes the language described in subsection (a)(1).*
 - (B) A written comment period of at least thirty (30) days.*
 - (C) A notice of public hearing before the appropriate board.*
- (d) The department shall include the following in the written materials to be considered by the board at the public hearing referred to in subsection (c):*
 - (1) The full text of the proposed rule as most recently prepared by the department.*
 - (2) Written responses of the department to written comments received during the comment period referred to in subsection (c).*
 - (3) The commissioner's findings under subsection (b).*
- (e) At the public hearing referred to in subsection (c), the board may:*
 - (1) adopt the proposed rule;*
 - (2) adopt the proposed rule with amendments;*
 - (3) reject the proposed rule;*
 - (4) determine that additional public comment is necessary; or*
 - (5) determine to reconsider the proposed rule at a subsequent board meeting.*
- (f) If the board determines under subsection (e) that additional public comment is necessary, the department shall publish a second notice in accordance with section 4 of this chapter and complete the rulemaking in accordance with this chapter.*
- (g) If the board adopts the proposed rule with amendments under subsection (e)(2), the amendments must meet the logical outgrowth requirements of section 10 of this chapter, except that the board, in determining whether the amendments are a logical outgrowth of comments provided to the board, and in considering whether the language of comments provided to the board fairly apprised interested persons of the specific subjects and issues contained in the amendments, shall consider the comments provided to the board at the public hearing referred to in subsection (c)(2)(C).*
- (h) This subsection applies to that part of a rule adopted under this section that directly corresponds to and is based on a federal law, rule, or regulation that is stayed or repealed, invalidated, vacated, or otherwise nullified by a legislative, an administrative, or a judicial action described in subdivision (1), (2), or (3). If:*
 - (1) a proposed rule is adopted by a board under subsection (e)(1) based on a determination by the commissioner under subsection (a)(1)(A) and the federal law, rule, or regulation on which the adopted rule is based is later repealed or otherwise nullified by legislative or administrative action, then that part of the adopted rule that corresponds to the repealed or nullified federal law, rule, or regulation is void as of the effective date of the legislative or administrative action repealing or otherwise nullifying the federal law, rule, or regulation;*
 - (2) a board adopts a proposed rule under subsection (e)(1) that is based on a determination by the commissioner under subsection (a)(1)(A) and the federal law, rule, or regulation on which the adopted rule is based is later invalidated, vacated, or otherwise nullified by a judicial decree, order, or judgment of a state or federal court whose decisions concerning such matters have force and effect in Indiana:*
 - (A) then that part of the rule that corresponds to the invalidated, vacated, or otherwise nullified federal law, rule, or regulation shall not be enforced by the commissioner or any other person during the time in which an appeal of the judicial decree, order, or judgment can be commenced or is pending; and*
 - (B) either:*
 - (i) that part of the adopted rule that corresponds to the invalidated, vacated, or otherwise nullified federal law, rule, or regulation is void as of the date that the judicial*

decree, order, or judgment becomes final and unappealable; or
(ii) enforcement of the adopted rule is restored if the
judicial decree, order, or judgment is reversed, vacated, or otherwise nullified on appeal;
and
(3) the federal law, regulation, or rule that is the basis of a rule that is adopted
under subsection (e)(1) and based on a determination by the commissioner under
subsection (a)(1)(A) is stayed by an administrative or a judicial order pending an
administrative or a judicial action regarding the validity of the federal law, rule, or
regulation, the commissioner may suspend the enforcement of that part of the adopted
rule that corresponds to the stayed federal law, rule, or regulation while the stay is in
force.

This is what is commonly referred to as a “Section 8” rulemaking. Under this section, there is one notice of written comment period and accompanying draft rule language, one public hearing and one board adoption. This is the most expedited of the rulemaking actions under this chapter and can only be used in very limited circumstances. Again, the agency must publish the commissioner’s findings as to why this section applies to a rulemaking when the draft rule and notice of hearing is published in the Indiana Register. This process is limited to rules that are incorporating a federal law or rule that applies to Indiana. The rule language can be spelled out rather than simply referencing a federal regulation (for example, “40 CFR 122.23” which is Title 40 of the Code of Federal Regulations section 122.23) but the language in the draft rule cannot contain any changes that substantively affect how the federal law or rule will apply to persons affected in Indiana. The draft rule can also be a technical amendment to existing rule that does not substantively affect how the existing rule applies to affected parties. The final type of situation to which this section applies is a change to an existing rule which is intended to clarify the rule. By far, the section 8 rulemaking power is used most often for incorporation by reference of federal laws and regulations.

The board packet for a section 8 rulemaking must include the rule as most recently prepared by the department (the rule may change based on comments received during the one written comment period), a summary of the comments received during the written comment period and IDEM’s responses thereto, and the commissioner’s written findings as to why the rulemaking qualifies under this expedited process.

The board may adopt the rule as presented by the agency, adopt the rule with amendments or choose to reject the rule. Just as in a section 7 rulemaking, the board can disagree with the commissioner’s findings that a particular rule qualifies for rulemaking under section 8. If that happens, the board can direct the agency to take the rule back to second notice and send the rule through the regular rulemaking process under this chapter. The board may also hold off on board action and decide to reconsider the rule at a subsequent board meeting. If the board adopts the rule with amendments, those amendments must meet the “logical outgrowth” test as outlined in section 10 of this chapter.

As this rulemaking process often incorporates a federal regulation or law, there are times when those federal laws are subsequently invalidated by either federal legislative or judicial action. If a federal law or rule is voided or nullified by federal legislative or administrative action, the part of the Indiana law that corresponds to that is void as of the date of the federal action. When there is a portion of a federal law or rule that is the subject of a judicial action that invalidates or nullifies the law or rule and the court action would have force and effect in Indiana, enforcement of the portion of the state rule that corresponds to the portion of the federal

rule affected by the federal judicial action is stayed during the appeal of the judicial action. Once the time for appeal runs or the case is finalized, if the federal rule is allowed to stand then state enforcement of the rule is restored. If the federal rule is ultimately nullified, the portion of the state rule that corresponds to that portion of the federal rule is void as of the date the judgment becomes final.

IC 13-14-9-9

Action upon proposed rules

Sec. 9. After complying with sections 2 through 8 of this chapter, the board may, at the board meeting held under section 5(a)(3) of this chapter:

(1) adopt a rule that is identical to the proposed rule published under section 5(a)(2) of this chapter;

(2) adopt the proposed rule with amendments that meet the criteria set forth in section 10 of this chapter;

(3) recommend amendments to the proposed rule that do not meet the criteria set forth in section 10 of this chapter;

(4) reject the proposed rule; or

(5) reconsider the proposed rule at a subsequent board meeting in accordance with IC 4-22-2-26(d).

This section explains the various actions available to the board at the final adoption hearing. The board may final adopt a rule that is identical to the rule that was preliminarily adopted or it may adopt the rule with amendments. Those amendments must meet the “logical outgrowth” requirements outlined in the next section. The board may also reject the proposed rule in accordance with section 12 of this chapter, or decide to delay board action to a subsequent board meeting. If the board decides to adopt amendments that do not meet the logical outgrowth criteria in section 10 of this chapter, the rule must be published in the Indiana Register with the amendments the board adopted and the board must hold another board meeting on the rule, allowing for another public hearing so that all people affected by the amendments have an opportunity to read the rule as amended and provide comment to the board.

IC 13-14-9-10

Amended proposals; logical outgrowth

Sec. 10. (a) A board may amend a proposed rule at a board meeting held under section 5(a)(3) of this chapter and adopt the amended rule under section 9(2) of this chapter if the amendments are a logical outgrowth of:

(1) the proposed rule as published under section 5(a)(2) of this chapter; and

(2) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter.

(b) In determining, for the purposes of this section, whether an amendment is a logical outgrowth of the proposed rule and any comments, the board shall consider:

(1) whether the language of:

(A) the proposed rule as published under section 5(a)(2) of this chapter; and

(B) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter;

fairly apprised interested persons of the specific subjects and issues contained in the amendment; and

(2) whether the interested parties were allowed an adequate opportunity to be heard by the board.

This section explains what constitutes a logical outgrowth of a rule when amendments to a draft rule are adopted. The rulemaking action taken as a whole must have allowed interested parties to understand the subjects and issues of the rulemaking and the amendments must be related to those subjects. Further, interested parties must have an opportunity to address the issues and subjects raised by the amendments. This prevents last minute inclusion of “left field” issues that may only be tangentially related to a rule for which interested parties may not be prepared. Comments provided to the board at the final adoption hearing can include the written comments submitted during the official written comment periods as well as oral testimony provided to the board.

IC 13-14-9-11

Amended proposals; notice

Sec. 11. If the board recommends amendments to a proposed rule under section 9(3) of this chapter, the full text of the proposed rule and accompanying amendments shall be published in accordance with section 5(a)(2) of this chapter. After that publication, the board shall hold another board meeting on the proposed rule under section 5(a)(3) of this chapter.

Section 11 applies to amendments adopted by the board at the final adoption stage that do not meet the logical outgrowth criteria. If the board adopts such amendments, the rule must be published in the Indiana Register with the amendments the board adopted and the board must hold another board meeting on the rule, allowing for another public hearing so that all people affected by the amendments have an opportunity to read the rule as amended and provide comment to the board.

IC 13-14-9-12

Rejection; grounds

Sec. 12. The board may reject a proposed rule under section 9(4) of this chapter if one (1) of the following conditions exists:

(1) The following occurs or has occurred:

(A) under section 8 of this chapter, sections 3 and 4 of this chapter did not apply to the proposed rule; and

(B) either:

(i) the board determines that necessary amendments to the proposed rule will affect persons that reasonably require an opportunity to comment under section 4 of this chapter, considering the criteria set forth in section 8(a)(2) of this chapter; or

(ii) the board determines that due to the fundamental or inherent structure or content of the proposed rule, the only reasonably anticipated method of developing a rule acceptable to the board is to require the department to redraft the rule and to obtain the public comments under section 4 of this chapter.

(2) The following occurs or has occurred:

(A) the proposed rule was subject to sections 3 and 4 of this chapter; and

(B) either:

(i) the board makes a determination set forth in subdivision (1)(B)(i) or (1)(B)(ii); or

(ii) the board determines that, due to a procedural or other defect in the

implementation of the requirements under sections 3 and 4 of this chapter, an interested or affected party will be unfairly and substantially prejudiced if the public comment period under section 4 of this chapter is not again afforded and that no reasonable alternative method to obtain public comments is available to the interested or affected party other than the public comment period under section 4 of this chapter.

If the board rejects a rule at the final adoption stage, the board can direct the agency to send the rule back to either first or second notice whether that rule was previously subject to the first and second notice provisions of this chapter or not. The primary goal is to provide all interested persons with the opportunity to review rule language and be able to comment on it either through the written comment periods afforded under sections 3 and 4 of this chapter or through testimony to the board at the public hearings held prior to board action.

IC 13-14-9-13

Rejection; public comment

Sec. 13. If a board rejects a proposed rule under section 12 of this chapter, the proposed rule is subject to section 4 of this chapter whether or not the proposed rule has previously been the subject of the comment period required by section 4 of this chapter.

This section is related to a rulemaking that was started under section 8 of this chapter, which is the expedited process that limits the rulemaking to one public notice and written comment period and one hearing. The board can disagree that section 8 applies to a rule and direct the agency to send it back to the second notice stage and proceed through the regular rulemaking process.

IC 13-14-9-14

Procedures for board to establish water quality standards for combined sewer community; notice of rulemaking; hearing; EPA approval

Sec. 14. (a) Except as provided in subsection (g), sections 1 through 13 of this chapter do not apply to a rule adopted under this section.

(b) The board may use the procedures in this section to adopt a rule to establish new water quality standards for a community served by a combined sewer that has:

- (1) an approved long term control plan; and*
- (2) an approved use attainability analysis that supports the use of a CSO wet weather limited use subcategory established under IC 13-18-3-2.5.*

(c) After the department approves the long term control plan and use attainability analysis, the department shall publish in the Indiana Register a notice of adoption of a proposed rule to establish a CSO wet weather limited use subcategory for the area defined by the approved use attainability analysis.

(d) The notice under subsection (c) must include the following:

(1) Suggested rule language that amends the designated use to allow for a CSO wet weather limited use subcategory in accordance with IC 13-18-3-2.5.

(2) A written comment period of at least thirty (30) days.

(3) A notice of public hearing before the board.

(e) The department shall include the following in the written materials to be considered by the board at the public hearing referred to in subsection (d)(3):

(1) The full text of the proposed rule as most recently prepared by the department.

(2) Written responses of the department to written comments received during the comment period referred to in subsection (d)(2).

(3) The letter prepared by the department approving the long term control plan and

use attainability analysis.

(f) At the public hearing referred to in subsection (d)(3), the board may:

(1) adopt the proposed rule to establish a new water quality standard amending the designated use to allow for a CSO wet weather limited use subcategory;

(2) adopt the proposed rule with amendments;

(3) reject the proposed rule; or

(4) determine to reconsider the proposed rule at a subsequent board meeting.

(g) If the board adopts the proposed rule with amendments under subsection (f)(2), the amendments must meet the logical outgrowth requirements of section 10 of this chapter, except that the board, in determining whether the amendments are a logical outgrowth of comments provided to the board, and in considering whether the language of comments provided to the board fairly apprised interested persons of the specific subjects and issues contained in the amendments, shall consider the comments provided to the board at the public hearing referred to in subsection (d)(3).

(h) The department shall submit a new water quality standard established in a rule adopted under subsection (f) to the United States Environmental Protection Agency for approval.

The final section of IC 13-14-9 applies to a special type of rulemaking that deals specifically with communities with combined sewer overflows (CSOs) that have gone through the process of developing long term control plans for the reduction or cessation of CSOs and have also developed a use attainability analysis that supports the use of a CSO wet weather limited use subcategory for waters affected by the CSO. This process is required under the Clean Water Act, which requires that a change in a use designation for a water must include a public process in order for EPA to approve the use change designation. As many communities in Indiana have issues with CSOs, this process is one part of a multi-pronged approach to aid these communities in coming into compliance with the Clean Water Act in a way that enhances the waters of Indiana and allows communities to plan their infrastructure projects in an economically sound way.

The following “special” types of rulemaking will also come before the ERB:

Emergency rulemaking under IC 4-22-2-37.1

Currently IDEM’s emergency rulemaking powers, along with other state agencies with emergency rulemaking powers can be found at IC 4-22-2-37.1. However, during the 2013 Indiana General Assembly, the Code Revision Commission has proposed to move the authority for emergency rulemaking powers into each title of the Indiana Code that corresponds to the other powers and duties bestowed upon each agency. The pertinent portions of IC 4-22-2-37.1 that apply to IDEM are reproduced below. The revision proposed by the Code Revision Commission would not change the substantive requirements for the rulemaking and the actual process would remain in Title 4. The authority for ERB to adopt emergency rules would be moved to Title 13.

Sec. 37.1. *(a) This section applies to a rulemaking action resulting in any of the following rules:*

(13) An emergency rule adopted by the environmental rules board under IC 13-15-4-10(4) or to comply with a deadline required by or other date provided by federal law, provided:

- (A) the variance procedures are included in the rules; and*
- (B) permits or licenses granted during the period the emergency rule is in effect are reviewed after the emergency rule expires.*
- (c) After a rule described in subsection (a) has been adopted by the agency, the agency shall submit the rule to the publisher for the assignment of a document control number. The agency shall submit the rule in the form required by section 20 of this chapter and with the documents required by section 21 of this chapter. The publisher shall determine the format of the rule and other documents to be submitted under this subsection.*
- (d) After the document control number has been assigned, the agency shall submit the rule to the publisher for filing. The agency shall submit the rule in the form required by section 20 of this chapter and with the documents required by section 21 of this chapter. The publisher shall determine the format of the rule and other documents to be submitted under this subsection.*
- (e) Subject to section 39 of this chapter, the publisher shall:*
 - (1) accept the rule for filing; and*
 - (2) electronically record the date and time that the rule is accepted.*
- (f) A rule described in subsection (a) takes effect on the latest of the following dates:*
 - (1) The effective date of the statute delegating authority to the agency to adopt the rule.*
 - (2) The date and time that the rule is accepted for filing under subsection (e).*
 - (3) The effective date stated by the adopting agency in the rule.*
 - (4) The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the rule.*
- (g) Subject to subsection (h), IC 14-10-2-5, IC 14-22-2-6, IC 22-8-1.1-16.1, and IC 22-13-2-8(c), and except as provided in subsections (j), (k), and (l), a rule adopted under this section expires not later than ninety (90) days after the rule is accepted for filing under subsection (e). Except for a rule adopted under subsection **(a)(13)**, (a)(24), (a)(25), or (a)(27), the rule may be extended by adopting another rule under this section, but only for one (1) extension period. The extension period for a rule adopted under subsection (a)(28) may not exceed the period for which the original rule was in effect. **A rule adopted under subsection (a)(13) may be extended for two (2) extension periods.***

The bolded sections refer to the emergency rules adopted by the ERB. The ability to do emergency rules is directly tied to either the suspension of time for processing permit applications under IC 13-15-4-10 or a deadline or date under federal law that must be met quickly. A prime example of the use of the emergency rulemaking power is when EPA redesignates a county in Indiana to attainment under the Clean Air Act. Because the designations are contained in our state rules, if the regular rulemaking process was followed, the county would have to wait several months for the completion of the regular rulemaking process under IC 13-14-9 after the federal designation is effective before the benefits of such a designation would be available to it. With emergency rulemaking powers, Indiana can secure the benefits of such a designation almost immediately while starting the expedited rulemaking process under IC 13-14-9-8 to make the revised designation a permanent part of the rules. Even under the expedited process of a section 8 rulemaking, the promulgation process takes approximately 6 months from publication of the section 8 notice in the Indiana Register to the rule being effective.

“Sunset” rulemaking under IC 13-14-9.5

“Sunset” rulemaking refers to the process of periodically reviewing administrative rules to determine whether they need to be updated or removed from the administrative code. IDEM’s process is contained at IC 13-14-9.5. Under this chapter, with certain exceptions, an administrative rule expires on January 1 of the seventh year after the year in which the rule takes effect or has been amended. Each time the rule is open for amendment, the 7 year clock restarts. Rules that incorporate a federal rule by reference or adopt a federal mandate in its entirety without substantive amendment are not subject to the sunset process and are not required to be included with rules that do not sunset but still require a hearing before the board.

Rules that are required to receive or maintain delegation of federal programs such as those delegated to the state under the Clean Water Act (CWA), Clean Air Act (CAA), and the Resource Conservation and Recovery Act (RCRA) do not expire. However, they are subject to a notice to be published in the Indiana Register that lists the rules that have been effective without any amendment for 7 years and provides for a written comment period requesting comment on any rules that should be reviewed through the regular IC 13-14-9 rulemaking process. There is also a provision for a hearing before the board at which interested persons can provide testimony to the board as to why a rule that does not expire should be reviewed through the regular rulemaking process. The board, after reviewing any comments received during the written comment period and hearing testimony is required to direct the department as to whether any rulemaking actions should be initiated to address concerns raised by interested parties.

Rules that actually do expire or sunset are also required to be listed in a notice published in the Indiana Register in the seventh year after the year in which they were either adopted or amended. The notice must list the rules that are set to expire without readoption and also include any rules the agency is proposing to let expire. The notice contains a written comment period in which interested parties can submit comments as to why a particular rule should be readopted through the regular rulemaking process under IC 13-14-9 rather than under the single readoption process that allows the board to readopt all listed rules in the notice under one rulemaking action. If a person submits to the department a request that a rule be readopted separately from the readoption action for all listed rules, the board must direct the agency to review the rule through the regular rulemaking process. The pertinent statutes related to the sunset process are included below.

IC 13-14-9.5-1

Exceptions

Sec. 1. This chapter does not apply to a rule that incorporates a federal regulation by reference or adopts under a federal mandate a federal regulation in its entirety without substantive additions.

IC 13-14-9.5-1.1

Rules that do not expire; public hearings

Sec. 1.1. (a) This section applies to the following:

- (1) A rule that is required to receive or maintain:*
 - (A) delegation;*
 - (B) primacy; or*
 - (C) approval;*

for state implementation or operation of a program established under federal law.

- (2) A rule that is required to begin or continue receiving federal funding for the implementation or operation of a program.*

- (b) A rule described in subsection (a) does not expire under this chapter.*
- (c) In the seventh year after the effective date of a rule or an amendment to a rule described in subsection (a), the department shall publish a notice in the Indiana Register. The notice may contain a list of several rules that have been effective for seven (7) years. A separate notice must be published for each board with rulemaking authority. A notice under this subsection must provide for the following:*
 - (1) A written comment period of at least thirty (30) days.*
 - (2) A request for comments on specific rules that should be reviewed through the regular rulemaking process under IC 13-14-9.*
 - (3) A notice of public hearing before the appropriate board.*
 - (4) The information required to be identified or described under IC 13-14-9-4(5) through IC 13-14-9-4(7) in the same manner that would apply if the proposed renewal of the expired rule were a proposal to adopt a new rule.*
- (d) The department shall:*
 - (1) prepare responses to all comments received during the comment period; and*
 - (2) provide all comments and responses to the board during the public board hearing;**described in subsection (c).*
- (e) The board, after considering the written comments and responses, as well as testimony at the public hearing described in subsection (c), shall direct the department on whether additional rulemaking actions must be initiated to address concerns raised to the board.*
- (f) For the rules described in subsection (a) that are effective on or before July 1, 2001, the notice described in subsection (c) shall be published in the Indiana Register before December 31, 2008.*

IC 13-14-9.5-2

Dates for expiration

Sec. 2. (a) Except as provided in subsection (b) or section 1.1 of this chapter, an administrative rule adopted under IC 13-14-9 expires January 1 of the seventh year after the year in which the rule takes effect, unless the rule contains an earlier expiration date. The expiration date of a rule under this section is extended each time that a rule amending an unexpired rule takes effect. The rule, as amended, expires on January 1 of the seventh year after the year in which the amendment takes effect.

- (b) An administrative rule that:*
 - (1) was adopted under a provision of IC 13 that has been repealed by a recodification of IC 13;*
 - (2) is in force on December 31, 1995; and*
 - (3) is not amended by a rule that takes effect after December 31, 1995, and before January 1, 2002;**expires not later than January 1, 2002.*

(c) The determination of whether an administrative rule expires under this chapter shall be applied at the level of an Indiana Administrative Code section.

IC 13-14-9.5-3

Procedures for readoption

Sec. 3. (a) The department or a board that has rulemaking authority under this title may adopt a rule under IC 13-14-9 in anticipation of a rule's expiration under this chapter.

- (b) Except as provided in section 5 of this chapter, the department or a board that has rulemaking authority under this title may not use emergency rule procedures to readopt a*

rule that is subject to expiration under this chapter.

IC 13-14-9.5-4

Readoption of rules; request for readoption of particular rule

Sec. 4. (a) Except as provided in subsection (b), with respect to the rules subject to expiration under this chapter, the department or a board that has rulemaking authority under this title:

(1) may readopt one (1) or more of the rules under one (1) rule that lists all rules that are readopted by their titles and subtitles only; and

(2) shall publish a notice in the Indiana Register identifying:

(A) the rules, if any, that will be readopted; and

(B) the rules, if any, that will not be readopted.

A rule that has expired but is readopted under this subsection may not be removed from the Indiana Administrative Code.

(b) If a person submits to the department or a board that has rulemaking authority under this title a written request stating a basis for the request during the first comment period that a particular rule be readopted separately from the readoption rule described in subsection (a), the department or board must:

(1) consider readoption of that rule separately from the readoption rule described in subsection (a); and

(2) follow the procedure for adoption of administrative rules under IC 13-14-9 with respect to the rule.

(c) If the department or board does not receive a written request under subsection (b) regarding a rule within the first comment period, the agency may:

(1) submit the readoption rule for filing with the publisher under IC 4-22-2-35 and publish notice in the Indiana Register that the agency has readopted the rule; or

(2) for one (1) or more of the rules proposed to be readopted as part of the readoption rule described in subsection (a), elect the procedure for readoption under IC 13-14-9.

(d) If a person submits to the department or a board that has rulemaking authority under this title a written request stating a basis for the request during the first comment period that a particular rule that the department or board does not intend to readopt as part of the readoption rule described in subsection (a) be readopted, the department or board must:

(1) consider readoption of that rule separately from the readoption rule described in subsection (a); and

(2) follow the procedure for adoption of administrative rules under IC 13-14-9 with respect to the rule.